(2)

Supreme Court, U.S.
FILED
NOV 14 1997
CLERK

No. 97-714

In The

Supreme Court of the United States

OCTOBER TERM, 1997

TERRA INTERNATIONAL, INC., *et al.*,
Petitioners,

v.

MISSISSIPPI CHEMICAL CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Randy Duncan
Stephen R. Eckley
DUNCAN, GREEN, BROWN, LANGENESS & ECKLEY, PC
380 Capital Square
400 Locust Street
Des Moines, IA 50309
(515) 288-6440

William L. Smith
Ethel Truly
Bruce J. Brumfield
MISSISSIPPI CHEMICAL CORPORATION
P.O. Box 1499
Yazoo City, MS 39149
(601) 751-2938

E. Edward Bruce
Robert A. Long, Jr.
Counsel of Record
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, DC 20044
(202) 662-6000

R. David Kaufman
M. Patrick McDowell
BRUNINI, GRANTHAM, GROWER & HEWES, PLLC
1400 Trustmark Building
P.O. Drawer 119
Jackson, MS 39205
(601) 948-3101

Counsel for Respondent Mississippi Chemical Corporation

November 1997

QUESTIONS PRESENTED

1. Whether federal law, which governs a district court's decision whether to give effect to a forum-selection clause for purposes of a transfer motion under 28 U.S.C. § 1404(a), also governs the district court's decision whether to allow a party to circumvent a forum-selection clause through artful pleading.

2. Whether the court of appeals, in determining that the tort claims in this case arise out of a contract between the parties and are thus within the scope of the contract's forum-selection clause, properly considered whether those claims involve the same operative facts as parallel claims for breach of contract.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 LISTING

The parties to the proceeding are named in the caption and in Petitioners' Rule 29.6 statement. *See* Pet. ii.

Respondent Mississippi Chemical Corporation has no parent company. Mississippi Chemical Corporation has the following subsidiaries, other than wholly-owned subsidiaries: Farmland MissChem Limited; FMCL Limited Liability Company; Houston Ammonia Terminal, L.P.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATEMENT	2
REASONS FOR DENYING THE WRIT	6
CONCLUSION	19

TABLE OF AUTHORITIES

Page

Cases

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) 7
Atherton v. FDIC, 117 S. Ct. 666 (1997) 11, 12
Baldwin v. Equitable Life Assurance Society, 108 N.W.2d 66 (Iowa 1961) 12
Black v. Cutter Laboratories, 351 U.S. 292 (1956) . . . 13
Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190 (3d Cir. 1983) . . . . . *passim*
Crescent International, Inc. v. Avatar Communities, Inc., 857 F.2d 943 (3d Cir. 1988) 15
Davenport Mach. & Foundry Co. v. Adolph Coors Co., 314 N.W.2d 432 (Iowa 1982) 9
East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986) 16
Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 6, 7, 11, 13
Estate of Hensley v. Estate of Hensley, 524 So. 2d 325 (Miss. 1988) 12
General Envtl Science Corp. v. Horsfall, 1994 U.S. App. LEXIS 13398 (6th Cir. 1994) . . . 16
Graham Technology Solutions, Inc. v. Thinking Pictures, Inc., 949 F. Supp. 1427 (N.D. Cal. 1997) 15
Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916) 17
Hanna v. *Plumer*, 380 U.S. 460 (1965) 7
Hazell Machine Co. v. Shahan, 161 So. 2d 618 (Miss. 1964) 14

Heritage Cablevision v. New Albany Electric Power System, 646 So. 2d 1305 (Miss. 1994) 12
Jumara v. State Farm Insurance Co., 55 F.3d 873 (3d Cir. 1995) 10, 11
Karl Koch Erecting Co. v. New York Convention Ctr. Development Corp., 838 F.2d 656 (2d Cir. 1988) 10
Lambert v. Kysar, 983 F.2d 1110 (1st Cir. 1993) . . *passim*
Manetti-Farrow, Inc. v. Gucci America, Inc., 858 F.2d 509 (9th Cir. 1988) 5, 6, 11, 14, 15
Mississippi Chemical Corp. v. Terra International, Inc., No. 5:95-CV-127, 1996 WL 293764 (S.D. Miss., Jan. 31, 1996) 4
Northwestern National Insurance Co. v. Donovan, 916 F.2d 372 (9th Cir. 1990) 11
O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994) 11, 12
Omron Healthcare, Inc. v. Maclaren Exports Ltd., 28 F.3d 600 (7th Cir. 1994) 10, 14, 15
Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) . . . 17
Stewart Organization v. Ricoh Corp., 810 F.2d 1066 (11th Cir. 1987), *aff'd on other grounds*, 487 U.S. 22 (1988) 15, 16
Stewart Organization, Inc. v. Ricoh Corp., 487 U.S. 22 (1988) 7, 8, 9, 11, 12, 14
Van Dusen v. Barrack, 376 U.S. 612 (1964) 7
Walker v. Armco Steel Corp., 446 U.S. 740 (1980) 7

Statutes

28 U.S.C. § 1254(1) 2
28 U.S.C. § 1404(a) . . . . . *passim*

Treatises

15 Charles Alan Wright, *et al.*,
Federal Practice and Procedure,
(2d ed. 1986 & 1997 Supp.) 17, 18

Charles Alan Wright, *The Law of Federal Courts*
(4th ed. 1983) 12

No. 97-714

In The

Supreme Court of the United States

OCTOBER TERM, 1997

TERRA INTERNATIONAL, INC., *et al.*,
Petitioners,

v.

MISSISSIPPI CHEMICAL CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

Petitioners seek review of a fact-bound ruling transferring this case to another federal district court pursuant to 28 U.S.C. § 1404(a). The questions presented in the petition for a writ of certiorari were not raised in the court of appeals below and are unlikely to affect the outcome of this case. In addition, the decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Accordingly, further review is not warranted.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 119 F.3d 688. The opinion of the district court (Pet. App. 23a-133a) is reported at 922 F. Supp. 1334.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1997. Pet. App. 1a. The court of appeals denied a petition for rehearing on August 18, 1997. Pet. App. 20a-21a. The petition for a writ of certiorari was filed on October 24, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT

1. Petitioner Terra International, Inc. ("Terra") manufactures and distributes agricultural products, including nitrogen-based fertilizers. Respondent Mississippi Chemical Corporation ("MCC") also produces nitrogen-based fertilizers. In the late 1970s, MCC developed an improved ammonium nitrate neutralization process and designed an improved version of a vessel, known as a "neutralizer," in which ammonium nitrate is made. MCC's improvements reduced emissions into the environment and increased the efficiency of the ammonium nitrate manufacturing process. Pet. App. 2a.

MCC decided to make its neutralizer design available for a nominal license fee to other ammonium nitrate producers. Neutralizers incorporating MCC's design are used at 22 ammonium nitrate manufacturing facilities. In 1980, MCC licensed its design to Terra for Terra's use in constructing a neutralizer for its fertilizer plant in Port Neal, Iowa. The Licensing Agreement required MCC to provide Terra with a basic design for the neutralizer, to review Terra's detailed design, and to provide training and start-up engineering assistance. Terra paid MCC slightly less than $40,000 for the license. The Licensing Agreement contains a forum-selection

clause which states that "[a]ny dispute or disputes arising between the parties hereunder, insofar as the same cannot be settled by friendly agreement, will be determined in the District Court of the United States for the Southern District of Mississippi." *Id.* at 2a-3a & n.2.

On December 13, 1994, an explosion at Terra's Port Neal facility killed four people, injured 18 others, and severely damaged the facility. Pet. App. 3a-4a. The U.S. Environmental Protection Agency conducted a comprehensive investigation and "concluded that the explosion resulted from a lack of written, safe operation procedures at the Terra Port Neal ammonium nitrate plant." EPA, *Chemical Accident Investigation Report: Terra Industries, Inc. Nitrogen Fertilizer Facility, Port Neal, Iowa* 1-2 (MCC C.A. App. 39-40).

Disregarding the contractual forum-selection clause, Terra filed suit against MCC on August 31, 1995, in the United States District Court for the Northern District of Iowa, where Terra has its principal place of business. While Terra's complaint repeatedly refers to MCC's obligations under the Licensing Agreement, Terra nonetheless made no claim for breach of contract. Instead, Terra asserted only tort claims for negligent design, failure to warn, failure to train, and strict liability. Within two hours after Terra filed its action, MCC filed an action in the United States District Court for the Southern District of Mississippi seeking a declaration that MCC is not liable for the explosion at the Port Neal facility. Pet. App. 4a.[1]

MCC filed a motion to transfer Terra's action from federal court in Iowa to federal court in Mississippi pursuant to 28 U.S.C. § 1404(a). Terra, in turn, filed a motion to enjoin

---

[1] MCC's complaint also asserts a defamation claim against Terra based on public statements by Terra officials asserting that MCC's neutralizer caused the explosion. Pet. App. 4a & n.4.

MCC from proceeding with the action in Mississippi federal court. Pet. App. 4a.[2]

2. The district court (N.D. Iowa, Bennett, J.) granted MCC's motion to transfer Terra's action to Mississippi. In a lengthy and detailed opinion, the district court considered the convenience of parties and witnesses and the interests of justice and concluded that those factors did not weigh decidedly in favor of either forum. Pet. App. 60a-84a. The district court then interpreted the forum-selection clause to apply to Terra's claims, finding that the parties intended the clause to cover any disputes directly or indirectly related to the Licensing Agreement. Pet. App. 84a-123a.

3. A unanimous panel of the court of appeals (Wollman, Henley, *Hansen*, JJ.) affirmed. Pet. App. 1a-19a. First, while acknowledging that the language of the forum-selection clause "is reasonably susceptible" to the district court's interpretation, Pet. App. 8a, the court of appeals accepted Terra's argument that the forum-selection clause should be interpreted to apply only to disputes arising under the licensing agreement. Pet. App. 10a.

The court then considered "whether Terra's tort claims actually arise under the license agreement," Pet. App. 10a, and concluded that they do. In conducting this inquiry, which it characterized as "rather case-specific," Pet. App. 12a, the court of appeals looked to decisions of other courts that had addressed similar issues. The court of appeals identified three "guiding principles": (1) whether the tort claims "ultimately depend on the existence of a contractual relationship" between

---

[2] Terra also filed a motion under Section 1404(a) in the Mississippi case seeking to transfer that case to Iowa. A magistrate judge denied Terra's motion, *Mississippi Chemical Corp. v. Terra Int'l, Inc.*, No. 5:95-CV-127, 1996 WL 293764 (S.D. Miss., Jan. 31, 1996), and the district court affirmed the magistrate judge's ruling. *See* Pet. App. 4a-5a n.5.

the parties, *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 203 (3d Cir. 1983); (2) "whether resolution of the claims relates to interpretation of the contract," *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988); and (3) whether "contract-related tort claims involv[e] the same operative facts as a parallel claim for breach of contract," *Lambert v. Kysar*, 983 F.2d 1110, 1121-22 (1st Cir. 1993). *See* Pet. App. 12a-13a. The court of appeals concluded that the first two principles are "inconclusive" when applied to the facts of this case, but that the third "approach is more revealing in this case." Pet. App. 13a. The court reasoned that "it is clear that Terra's tort claims involve the same operative facts as would a parallel claim for breach of contract," because Terra could have "asserted a parallel claim for breach of contract" based on "the same exact facts" it alleges in support of its tort claims. Pet. App. 13a-14a. The court observed that "[s]trategic or artfully drawn pleadings . . . will not work to circumvent an otherwise applicable forum selection clause." *Id.* (citing *Lambert*, 983 F.2d at 1121, and *Coastal Steel*, 709 F.2d at 203).

In addition, the court of appeals held that "[s]everal other considerations also persuade us that the forum selection clause covers Terra' tort claims." Pet. App. 14a. First, Paragraph 2(b) of the Licensing Agreement provides that MCC will reimburse Terra for costs or damages resulting from "any defect in the design of [Terra's] neutralizer . . . which can be shown to result from errors in the information contained in the Design Manual." *Id.* The court concluded that this provision "expressly envisions that future claims of defective design may arise between the parties." *Id.* This led the court to believe that "[a]fter finalizing the license agreement, . . . both parties could have anticipated that tort claims such as Terra now brings would be litigated in Mississippi." *Id.* In addition to the language of Paragraph 2(b), the court observed that

"Terra's own complaint repeatedly refers to the specific promises that MCC made under the licensing agreement." *Id.*

Finally, the court of appeals held that the district court did not abuse its discretion in determining that other factors do not outweigh the parties' choice of forum for purposes of a transfer motion under Section 1404(a). The court declined to decide whether "the burden was on Terra to demonstrate why the forum selection clause should not be enforced," because it agreed with the district court that "even if the burden remained with MCC, MCC met that burden." Pet. App. 16a. The court of appeals observed that the district court had "meticulously analyzed the numerous criteria that courts traditionally consider when deciding a motion to transfer." Pet. App. 17a (listing 12 separate criteria). The court of appeals therefore held that "the district court did not abuse its discretion in deciding to transfer this lawsuit to Mississippi." Pet. App. 19a.

REASONS FOR DENYING THE WRIT

1. a. The first question presented by the petition plainly does not warrant review. As an initial matter, Terra's briefs in the court of appeals did not present the issue that it now seeks to raise, namely "whether, under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the interpretation of forum selection clauses should . . . be governed by federal law." Pet. 9 (emphasis omitted). Terra's briefs in the court of appeals did not even cite even cite *Erie*, let alone discuss the *Erie* doctrine. Nor did Terra contend that the court of appeals was required to restrict its analysis to state law. To the contrary, Terra's briefs cited *and relied on* the very cases discussed in the court of appeals' opinion — the Third Circuit's decision in *Coastal Steel*, the Ninth Circuit's decision in *Manetti-Farrow*, and the First Circuit's decision in *Lambert*. *See* Terra C.A. Br.

41.[3] Those cases arose in three different states; in each case, the court of appeals applied federal law. Because Terra did not raise an *Erie* issue, it is not surprising that the court of appeals' opinion does not address any such issue. This Court generally does not consider issues that were not properly raised in and decided by the court below. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (citing additional cases). There is no reason to depart from that rule in this case.

b. As petitioners recognize (Pet. 9), analysis of the first question presented by the petition begins with this Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988). In *Stewart*, the Court held that a federal court sitting in diversity must apply federal law in adjudicating a motion under 28 U.S.C. § 1404(a) to transfer a case to the venue specified in a contractual forum-selection clause. In reaching that result, the Court did not engage in the "relatively unguided" *Erie* analysis. 487 U.S. at 26 (quoting *Hanna* v. *Plumer*, 380 U.S. 460, 471 (1965)). Instead, the Court asked (1) whether 28 U.S.C. § 1404(a) "is 'sufficiently broad to control the issue before the Court,'" and (2) if so "whether the statute is a valid exercise of Congress' authority." 487 U.S. at 26-27 (quoting *Walker v. Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980)). The Court held that federal law rather than state law governs the decision whether to give effect to a forum-selection clause in a particular case, because Section 1404(a) "is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" 487 U.S. at 29 (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)). The Court reasoned that a state-law rule according a forum-selection clause no consideration would conflict with "the flexible and multifaceted analysis that

---

[3] For the convenience of the Court, MCC has lodged copies of the parties' briefs in the court of appeals with the Clerk of this Court.

Congress intended to govern motions to transfer." 487 U.S. at 31.

Petitioners contend that *Stewart* did not resolve "the larger question . . . whether . . . the interpretation of forum selection clauses should also be governed by federal law." Pet. 9 (emphasis omitted). This case plainly does not present that "larger question." The court of appeals *agreed* with Terra's construction of the forum-selection clause in this case when it rejected the district court's interpretation and held that the clause applies only to disputes arising under the Licensing Agreement. In so holding, moreover, the court of appeals cited decisions of both the Mississippi and Iowa courts. *See* Pet. App. 8a-10a & n.8. Thus, on the basic issue of contract interpretation in this case, Terra cannot object to the result the court of appeals reached or its methodology.

The issue in this case thus is not the proper interpretation of the forum-selection clause, but rather is whether a federal court, in deciding a transfer motion under 28 U.S.C. § 1404(a), should treat tort claims as arising out of a contractual relationship for purposes of a forum-selection clause. This narrow issue is closely tied to the decision whether to enforce a forum-selection clause. As lower courts have recognized, parties may attempt to evade a forum-selection clause through "artful pleading." *See, e.g., Lambert*, 983 F.2d at 1121; *Coastal Steel*, 709 F.2d at 203. A state-law rule that effectively allowed parties to nullify forum-selection clauses through artful pleading, like the state-law rule in *Stewart* that made forum-selection clauses unenforceable, would conflict with 28 U.S.C. § 1404(a).[4]

---

[4] Petitioners themselves argue that there is a connection between a state's willingness to enforce forum-selection clauses and its willingness to permit circumvention of such clauses through artful pleading. *See* Pet. 18 n.9 (arguing that, because "[f]orum selection clauses are unenforceable under Iowa law," a court applying Iowa law should read forum selection

Accordingly, Terra's assertion (Pet. 3) that the issue before this Court entails only "a simple question of contract interpretation" as to which "[f]ederal courts have no particular expertise . . . and . . . no discernible federal policy to guide" them misstates the nature of the decision below. Terra *won* the battle of "contract interpretation" before the Eighth Circuit. Federal courts do, however, have the requisite "expertise" and "discernible federal policy" to decide whether, by artful pleading or otherwise, a plaintiff can circumvent a forum-selection clause, and thus prevent such a clause from receiving the consideration that is due to it under Section 1404(a). *See Stewart*, 487 U.S. at 31.[5]

c. Terra's assertion (Pet. 10-13) that the courts of appeals are divided over the application of federal law in interpreting forum-selection clauses is based upon secondary sources and *dicta* in lower court decisions. The petition itself reveals that there is no such conflict.

Terra states that "'[t]he Second, Ninth and Eleventh Circuits essentially treat forum clauses as procedural' and therefore governed by federal law, while '[t]he Third and Eighth Circuits'" take the opposite view. Pet. 11 (quoting

---

clauses narrowly. (In fact, however, the case that petitioners cite, *Davenport Mach. & Foundry Co. v. Adolph Coors Co.*, 314 N.W.2d 432, 437 (Iowa 1982), holds that forum-selection clauses, "if otherwise fair, will be given consideration along with the other factors presented" by a *forum non conveniens* motion.)

[5] Petitioners' Statement of the Case asserts (Pet. 4) that "[t]his is a product liability action." This assertion is subject to challenge on two grounds. First, MCC did not manufacture a product, but instead provided only a basic design from which Terra developed a detailed design and constructed a piece of equipment. *See* Pet. App. 3a. Second, as the court of appeals recognized, "Terra's own complaint repeatedly refers to the specific promises that MCC made under the license agreement." Pet. App. 14a.

Lambert, 983 F.2d at 1116 n.10). But under Terra's own depiction of the decision below (the only Eighth Circuit decision petitioners cite), the Eighth Circuit applies federal law, and thus follows the view of the Second, Ninth, and Eleventh Circuits.[6]

This leaves only the Third Circuit. Petitioners cite a single Third Circuit case, *Jumara v. State Farm Ins. Co.*, 55 F.3d 873 (3d Cir. 1995), which they contend "held" that the scope of a forum-selection clause is controlled by state law. Pet. 12 (citing 55 F.3d at 881-82). *Jumara* held no such thing. Instead, *Jumara* held that a federal district court in Pennsylvania — as opposed to a Pennsylvania state court — could select a neutral third arbitrator under an arbitration agreement. The court looked to Pennsylvania's Uniform Arbitration Act to define the contractual phrase "court of record in the county," but it did so because the contracts at issue "specifically direct[ed] that 'the Pennsylvania Uniform Arbitration Act . . . shall apply.'" 55 F.3d at 882. The Third Circuit thus held that the contracts, "by their express terms," resolved the issue before it. *Id.* Obviously, the ruling in *Jumara* does not amount to a holding that state law generally governs the scope of forum-selection clauses in a Section

---

[6] The petition recognizes that the Seventh Circuit has joined the circuits that apply federal law. Pet. 12 (citing *Omron Healthcare, Inc. v. Maclaren Exports Ltd.*, 28 F.3d 600, 603 (7th Cir. 1994)). Petitioners cite a Second Circuit case that, they assert, interpreted a forum-selection clause "in accordance with state law," Pet. 12, but that decision merely (1) cited a New York case for the uncontroversial proposition that the "basic objective of contract interpretation is to determine [the] intent of the parties," and (2) *rejected* an argument based on a New York rule that arbitration agreements binding on only one party are not valid. *Karl Koch Erecting Co. v. New York Convention Ctr. Dev. Corp.*, 838 F.2d 656, 659-60 (2d Cir. 1988).

1404(a) analysis, nor does it conflict with the decision in this case.[7]

Apart from *Jumara*, petitioners quote general statements from *Manetti-Farrow*, 858 F.2d at 512 ("application of the *Erie* doctrine to forum selection clauses . . . has led to a split among the circuit courts"), *Lambert*, 983 F.2d at 1116 n.10 ("*Erie* issue . . . has divided the commentators and split the circuits"), and *Northwestern National Insurance Co. v. Donovan*, 916 F.2d 372, 374 (9th Cir. 1990) ("there is a division between the circuits"). *See* Pet. 9-10. Not one of these cases applied state law to determine the scope of a forum-selection clause. Moreover, all three cases involved motions to *dismiss* rather than motions to transfer under 28 U.S.C. § 1404(a). As the Ninth Circuit explained in *Manetti-Farrow*, this Court's decision in *Stewart* held that

> because there was a federal statute, 28 U.S.C. § 1404(a), directly on point, the district court was required to apply federal law. Our case involves a motion to dismiss, rather than to transfer venue, and because there is no federal rule directly on point the *Stewart* analysis is inapplicable.

858 F.2d at 512 n.2 (citation omitted).

d. Terra's invocation of *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), and *Atherton v. FDIC*, 117 S. Ct. 666 (1997), is wholly inappropriate. *See* Pet. 13-16. In both of those cases, this Court refused to create federal common law to assist a federal agency in pursuing claims against a private party when there was a well-developed body of state law governing those claims. This Court's understandable

---

[7] Elsewhere in the petition, moreover, petitioners cite the Third Circuit's earlier decision in *Coastal Steel*, 709 F.2d at 203, in arguing that the Third Circuit has applied federal common law in a forum-selection case. *See* Pet. 20-21.

reluctance to create a federal common law regime in these circumstances says nothing about the role of federal law in dealing with the issue raised in *Stewart* regarding the treatment of a forum-selection clause under 28 U.S.C. § 1404(a), or the analogous issue raised here regarding the application of a forum-selection clause to artfully pleaded claims under 28 U.S.C. § 1404(a).[8]

e. Petitioners assert (Pet. 18) that "[i]f the Eighth Circuit had applied either Mississippi or Iowa law, . . . the court would have been compelled to conclude that Terra's tort claims were not governed by the forum selection clause." In fact, application of Mississippi or Iowa law would not alter the result in this case.

Mississippi and Iowa, in common with other states, both recognize the basic principle that the intentions of the parties control interpretation of contractual provisions. *See, e.g., Heritage Cablevision v. New Albany Elec. Power Sys.*, 646 So. 2d 1305, 1312 (Miss. 1994) ("first rule of contract interpretation is to give effect to the intent of the parties") (quoting *Estate of Hensley v. Estate of Hensley*, 524 So. 2d 325, 327 (Miss. 1988)); *Baldwin v. Equitable Life Assurance Soc'y*, 108 N.W.2d 66, 70 (Iowa 1961) ("cardinal principle" of contract construction is "that the intention of the parties should control") (citations omitted). Although the court of appeals held (Pet. App. 10a) that Terra and MCC intended the forum-selection clause to apply only to disputes arising under the

---

[8] In addition, the Court's reluctance in *O'Melveny* and *Atherton* to permit federal courts to fashion rules of decision is based on its recognition that "[i]f an issue is controlled by federal common law, this is binding on both state and federal courts." Charles Alan Wright, *The Law of Federal Courts* § 60 at 392 (4th ed. 1983) (collecting authorities). In contrast, the court of appeals' decision in this case, which applies only to the federal courts' resolution of transfer motions under Section 1404(a), has no binding effect on state courts.

Licensing Agreement, the court went on to conclude that other language in the Agreement "expressly envisions that future claims of defective design may arise between the parties," and thus "both parties could have anticipated that tort claims such as Terra now brings would be litigated in Mississippi." *Id.* at 14a. Thus, the cardinal principle that the intentions of the parties control, recognized under both Mississippi and Iowa law, points to the result that the court of appeals reached. Because it appears that state law and federal law point to the same outcome in this case, there is no occasion to resolve any *Erie* issue. *See, e.g., Lambert*, 983 F.2d at 1116; *Coastal Steel*, 709 F.2d at 202. *See generally Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956) (this Court "reviews judgments").

Petitioners ignore the intentions of the parties and focus instead on the so-called "economic loss doctrine." *See* Pet. 16-18. The "economic loss" cases do not come close to "compelling" a ruling that Terra's tort claims are outside the scope of the forum-selection clause in this case. Not one of the cases that petitioners cite involved a forum-selection clause. Instead, the "economic loss" cases hold that tort law does not afford a remedy for a product defect that results in damage to the product itself and causes only economic loss to its purchaser. The "economic loss" cases establish, at most, that Terra can frame tort claims under the law of Mississippi and Iowa. But Terra's ability to frame tort claims merely raises, without answering, the question that the court of appeals addressed: whether Terra's tort claims are related to the agreement between Terra and MCC in such a way as to arise out of that agreement. The "economic loss" cases plainly do not compel an answer to that question. As the Mississippi Supreme Court has recognized, a tort "may sometimes have relation to obligations growing out of, or coincident with, a contract, and frequently the same facts will sustain either class

of action." *Hazell Mach. Co. v. Shahan*, 161 So. 2d 618, 623 (Miss. 1964) (internal quotation and citation omitted).

2. The second question presented by the petition — whether the court of appeals, in concluding that Terra's tort claims arose out of its contractual relationship with MCC, properly considered whether the tort claims involve the same operative facts as parallel claims for breach of contract — also was not properly presented to the courts below. Moreover, as is true for the first question, no circuit split arises from the Eighth Circuit's resolution of the particular issues in this case.

a. As the court of appeals recognized, determining the scope of a forum-selection clause is "a rather case-specific exercise." Pet. App. 12a. More generally, as this Court held in *Stewart*, Section 1404(a) "calls on the district court to weigh in the balance a number of case-specific factors." 487 U.S. at 29. Accordingly, the forum-selection clause is merely one of several case-specific factors that the district court must weigh in exercising its discretion under the statute. Such a fact-bound determination does not lend itself to the formulation of rigid rules and thus presents a particularly unsuitable occasion for this Court's exercise of its certiorari jurisdiction.

b. Terra did not argue to the court of appeals that it should apply one, and only one, of the "guiding principles" discussed in that court's opinion. Instead, Terra's brief string-cited and relied on all three of the cases that the court of appeals discussed, without suggesting that the cases are in conflict or would lead to different results in this case.[9] Thus the second question that Terra's petition presents, like the first question, was not presented to the court below.

---

[9] Terra's brief asserted: "Other courts . . . have applied the same legal standard in determining whether tort claims 'arise under' a contract." Terra C.A. Br. 41 (citing *Lambert*, *Manetti-Farrow*, and *Coastal Steel*).

c. The decision in this case does not conflict with the Ninth Circuit's decision in *Manetti-Farrow* or the Third Circuit's decision in *Coastal Steel*. *First*, the result in both of those cases — as well as in *Lambert*, 983 F.2d 1110, *Omron Healthcare*, 28 F.3d 600, and *Stewart Organization v. Ricoh Corp.*, 810 F.2d 1066 (11th Cir. 1987) (en banc), *aff'd on other grounds*, 487 U.S. 22 (1988) — was the same as the result in this case: the forum-selection clause was held to apply to the non-contractual claims at issue and enforced.

Second, it is far from clear that the panels in *Manetti-Farrow* or *Coastal Steel* intended to adopt a single, comprehensive "rule" to govern all future cases. The courts offered their differing verbal formulations without extensive discussion or consideration of possible alternatives, and without recognizing any tension with the law of another circuit. It is thus entirely possible that these courts will modify or supplement their verbal formulations in future cases. Indeed, the Third Circuit used a slightly different verbal formulation in a subsequent case. *See Crescent Int'l, Inc. v. Avatar Communities, Inc.*, 857 F.2d 943, 944 (3d Cir. 1988) (asking whether non-contractual claims "involve allegations arising out of the agreement implicating its terms").[10]

---

[10] Petitioners incorrectly assert that the First Circuit has recognized the existence of a circuit split on this issue. *See* Pet. 19 (citing *Lambert*, 983 F.2d at 1121). *Lambert* recognizes no such conflict; indeed, it cites and relies on *Coastal Steel*. 983 F.2d at 1121. Petitioners' assertion that a district court has recognized "conflicting circuit case law addressing this issue," Pet. 19 (quoting *Graham Tech. Solutions, Inc. v. Thinking Pictures, Inc.*, 949 F. Supp. 1427, 1433 (N.D. Cal. 1997)), is equally wide of the mark. The "conflict" mentioned in *Graham Technology* involved a Second Circuit decision that the district court recognized is readily "distinguishable . . . due to the fact that none of the parties in that case were parties to the agreement containing the forum selection clause." *Id.*

Petitioners are also incorrect in asserting (Pet. 20 n.10) that the Sixth Circuit adopted the *Manetti-Farrow* formulation in an unpublished decision,

Third, the court of appeals' decision in this case did not state that it was rejecting the other formulations, but merely said that the First Circuit's formulation "is more revealing *in this case*," and "merits application *to the circumstances before us*." Pet. App. 13a (emphasis added). The Eighth Circuit's opinion thus leaves open the possibility that it may find a different formulation more revealing in another case.

Fourth, it is not apparent that application of a different verbal formulation would lead to a different result in this case. The court of appeals concluded that the Third Circuit formulation and the Ninth Circuit formulation are both "inconclusive" as applied to this case. Pet. App. 13a. In any event, as noted above (at pp. 12-13), the court of appeals relied on language in the Licensing Agreement, apart from the language of the forum-selection clause itself, to conclude that the parties intended the Agreement to cover the tort claims in this case. Thus, the choice of a "default rule" to be applied when a court cannot discern the intent of the parties would not alter the result in this case.

d. Nor is there any conflict with decisions of this Court such as *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986). That case did not involve a forum-selection clause. As explained above (at p. 13), decisions

---

General Envtl Science Corp. v. Horsfall, No. 92-4110, 1994 U.S. App. LEXIS 13398 (6th Cir. May 24, 1994). The Sixth Circuit actually said that it "might be inclined to adopt" an argument based on *Lambert* in a future case, but the case before it involved claims that arose "well before the contract was ever executed." *Id.* at *26-*27. And petitioners are incorrect in asserting (Pet. 21 n.11) that the Eleventh Circuit adopted the *Coastal Steel* formulation in *Stewart*. In *Stewart*, the Eleventh Circuit concluded that "it is clear *from the language of the agreement* that the forum selection clause encompassed any dispute arising out of or in connection with" the agreement. 810 F.2d at 1070 (emphasis added).

adopting the "economic loss" doctrine merely determine whether the plaintiff is able to frame a tort claim. The issue in this case is whether Terra's tort claims — assuming they are proper as a matter of substantive tort law — should be viewed as arising out of its contract with MCC, in order to prevent Terra from evading the forum-selection clause through artful pleading.[11]

3. Terra's argument about the purported "great practical and legal importance" of the issues presented in this case, which rests upon its condemnation of "wasteful . . . litigation about where to litigate" (Pet. 24) is reminiscent of the plea of a son who has murdered his parents and then seeks mercy from the court because he is an orphan. This case reached the court of appeals (and thus to this Court) solely because of Terra's tactic of moving (unsuccessfully) for a preliminary injunction against litigation in the Mississippi federal district court when it opposed MCC's motion under Section 1404(a) to transfer this case to that court. *See* 15 Charles Alan Wright, *et al.*, *Federal Practice and Procedure* § 3855 at 472 (2d ed. 1986 & 1997 Supp.) (order granting or denying transfer motion under Section 1404(a) "is interlocutory and not immediately appealable").[12] Terra's plea for an end to wasteful litigation about where to litigate can best be met by denying its petition. *See Hamilton-Brown Shoe Co. v. Wolf*

---

[11] More relevant decisions of this Court include *Stewart*, which considered non-contractual claims "arising out of the contract," 487 U.S. at 24, and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20 (1974), which recognized that non-contractual securities claims arose out of a contract for the sale of a business.

[12] Moreover, the lengthy decisions of the district court in this case would not have been any shorter, nor would the issues have been any less hotly contested, if the courts below had adopted the views advanced in the petition for certiorari.

Bros. & Co., 240 U.S. 251, 258 (1916) (this Court generally declines to review interlocutory decisions).[13]

Litigation over the appropriate forum in which to try this case has now consumed two years. A district court in Terra's home state and a unanimous court of appeals (as well as a magistrate judge and a district judge in Mississippi) all have concluded that the case should be tried in Mississippi. There is no basis for further review of that fact-bound determination.

---

[13] In discussing appellate review of district court rulings under Section 1404(a), Professor Wright observes that

> a very compelling argument can be made that if there is no question of [judicial] power, and the only issue is whether the district judge exercised his discretion properly . . . interlocutory review ought not be available. This is the view of the commentators, it is the view of the American Law Institute, and it has been the view of many distinguished appellate judges.

Wright, *supra*, § 3855, at 475 (footnotes omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Randy Duncan
Stephen R. Eckley
DUNCAN, GREEN, BROWN, LANGENESS & ECKLEY, PC
380 Capital Square
400 Locust Street
Des Moines, IA 50309
(515) 288-6440

William L. Smith
Ethel Truly
Bruce J. Brumfield
MISSISSIPPI CHEMICAL CORPORATION
P.O. Box 1499
Yazoo City, MS 39149
(601) 751-2938

November 1997

E. Edward Bruce
Robert A. Long, Jr.
Counsel of Record
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, DC 20044
(202) 662-6000

R. David Kaufman
M. Patrick McDowell
BRUNINI, GRANTHAM, GROWER & HEWES, PLLC
1400 Trustmark Building
P.O. Drawer 119
Jackson, MS 39205
(601) 948-3101

Counsel for Respondent Mississippi Chemical Corporation